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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE Petitioner, v. THE SUPERIOR COURT OF STANISLAUS COUNTY, Respondent; BENJAMIN RUIZ LOPEZ et al., Real Parties in Interest	F058361 Super. Ct. Nos. 1241676, 1242220 & 1223370 O P I N I O N

ORIGINAL PROCEEDING; petition for writ of mandate. Edward M. Lacy, Jr. (Retired Judge of the Stanislaus Sup. Ct.) and David Minier (Retired Judge of the Madera Sup. Ct.) (assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.), Judges.*

* Judge Lacy heard the motion pertaining to Real Party in Interest Lopez; Judge Minier heard the motion pertaining to Real Party in Interest Kott.

Birgit Fladager, District Attorney, David P. Harris and Jared T. Carrillo, Deputy District Attorneys, for Petitioner.

Barkett & Gumpert and Franklin G. Gumpert for Respondent.

Timothy Bazar, Public Defender, and Nancy C. Smith, Deputy Public Defender, for Real Party in Interest Benjamin Ruiz Lopez.

No appearance for Real Party in Interest Jeffrey Alan Kott.

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In separate proceedings, real parties in interest filed motions to set aside a prior conviction, claiming the record did not demonstrate a sufficient waiver of their constitutional rights prior to entering their guilty pleas. The People sought to call a judge and a court commissioner to testify regarding their custom and habit in taking guilty pleas in order to prove the validity of the prior convictions. The judge and the commissioner refused to testify, claiming they were not competent witnesses under Evidence Code section 703.5 (section 703.5). It was found by the trial court that section 703.5 applied to criminal proceedings and thus the judge and the commissioner could not properly be called to testify by the People. A petition for writ of mandate was filed in the appellate division of the superior court. The petition was denied because it was found the writ could not be taken from an intermediate order. The People then filed this petition for writ of mandate in this court seeking a ruling that section 703.5 does not apply in criminal proceedings. Respondent superior court and real parties in interest claim the order is interlocutory and not the proper subject of a petition for writ of mandate. We will deny the petition and discharge the alternative writ as improvidently granted.

Background Law

Penal Code section 1321 provides: "The rules for determining the competency of witnesses in civil actions are applicable also to criminal actions and proceedings, except as otherwise provided in this Code." Evidence Code section 703.5 provides in part that "[n]o person presiding at any judicial or quasi-judicial proceeding, and no arbitrator or

mediator, shall be competent to testify, in any subsequent civil proceeding, as to any statement, conduct, decision, or ruling, occurring at or in conjunction with the prior proceeding" except under certain limited circumstances.

A defendant may file a collateral challenge to the constitutional validity of a prior conviction. One such challenge is a claim that the defendant was not admonished and did not knowingly and effectively waive his constitutional rights under *Boykin-Tahl* (*Boykin v. Alabama* (1969) 395 U.S. 238; *In re Tahl* (1969) 1 Cal.3d 122) before he entered a guilty plea. During a collateral challenge to a prior conviction, certain threshold presumptions apply: "'that official duty has been regularly performed' [citation]; that a court whose judgment is under collateral attack 'acted in the lawful exercise of its jurisdiction' [citation]; and the provision that the 'burden of producing evidence as to a particular fact is initially on the party with the burden of proof as to that fact.' [Citation.]" (*Curl v. Superior Court* (1990) 51 Cal.3d 1292, 1303.)

Once the defendant has alleged facts sufficient to justify a hearing on his motion to strike the prior conviction, the court shall conduct an evidentiary hearing. The People have the initial burden of producing evidence of the prior conviction that sufficiently shows that the defendant in fact suffered the conviction. "Once this prima facie showing has been made, the defendant has the burden of producing evidence to establish the constitutional invalidity of the prior conviction, and the burden of proof on such issue shall remain with the defendant. The People have the further right to present evidence in rebuttal. [Citations] At the conclusion of the hearing, the trial court must determine whether the defendant has carried his burden of establishing the constitutional invalidity of the prior conviction by a preponderance of the evidence." (*Curl v. Superior Court, supra,* 51 Cal.3d at p. 1307.) If the court finds the prior conviction to be valid, then the People will bear the full burden of proving the existence of the prior conviction beyond a reasonable doubt at trial. (*Ibid*.)

"To protect a defendant's fundamental rights, we must indulge every reasonable presumption against waiver of fundamental constitutional rights. [Citation.] The record on its face must show, among other things, an express and explicit waiver of rights. [Citations.] Thus, we may not presume a valid waiver from a silent record [citation] or infer a waiver from either the entry of a guilty plea after the advisement of rights [citation] or equivocal conduct, such as a defendant's failure to assert his or her rights [citation] or a defendant's silence when defense counsel waives his or her rights [citation]. In such circumstances, the record itself does not show that the defendant personally and unequivocally, that is, expressly and explicitly, waived his or her rights." (*People v. Anderson* (1991) 1 Cal.App.4th 318, 324.)

Background Facts and Proceedings[1]

A complaint was filed against real party in interest Jeffrey Alan Kott charging him with several alcohol-related misdemeanor Vehicle Code offenses. As to two of the counts, it was alleged that he had suffered a prior driving under the influence conviction in Stanislaus County in 2006. (*People v. Kott*, Stanislaus Super. Ct. No. 1223370.)

Kott filed a motion to set aside the 2006 prior conviction. He claimed the conviction was invalid because the court never made a finding that he expressly and explicitly waived his constitutional rights when he entered a guilty plea for the crime.

The People responded, conceding the minute order did not contain the words "expressly" or "explicitly" and therefore the court could not infer from the record that defendant "expressly and explicitly" waived his constitutional rights. The People proposed that the conceded error could be remedied by testimony from the judge who took the plea as to the judge's custom and habits.

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1 The People's request for judicial notice of the superior court files of the relevant underlying cases is granted; documents contained in those files are utilized in this background summary.

The minute order of the 2006 plea reflects that Kott was present in court and represented by counsel. The minute order was checked in places indicating Kott was "advised of" and "waives his Constitutional rights." In addition, the minute order contained the printed language that "[Defendant] has made an intelligent waiver of his rights" and his plea was freely and voluntarily made.

A form listing Kott and his case number was prepared on the same date as his plea and stamped with the name of the clerk who prepared the minute order. The form stated, "[t]he above-entitled defendant was advised, understood and waived the following rights." The rights were listed and each was checked. The rights were: the right to an attorney, the right to a jury trial, the right against self-incrimination, the right to confrontation and cross-examination of prosecution witnesses, and the right to the process of the court to subpoena witnesses and present evidence on defendant's behalf. The form was not signed or initialed by defendant nor was it signed by the trial judge.

The judge who took Kott's plea, Judge Cordova, was served a subpoena for his appearance at the motion to strike the prior conviction. A subpoena was also served for the court clerk who prepared the minute order and whose name was stamped on the list checking off the rights that were waived by Kott.

A motion to quash the subpoenas was filed by an attorney representing Judge Cordova and the court clerk. The basis for the motion was that Judge Cordova was statutorily incompetent to serve as a witness based on section 703.5 and Penal Code section 1321. In addition, it was argued Judge Cordova should not be compelled to attend because there were no extraordinary circumstances justifying interfering with the duties of a high government official and no showing that the evidence desired from him was not otherwise available to the court and the parties. The attorney claimed the court clerk could not be called to testify as to Judge Cordova's custom and habits because such testimony would be inadmissible hearsay.

On May 13, 2008, a hearing was held on the motion to quash the subpoenas. At the outset, the court stated that everyone agreed the prior conviction allegation had to be stricken unless the record shows Kott explicitly waived his constitutional rights and the record does not show that. The court stated the record could be augmented by testimony to prove the validity of the prior conviction. After hearing the arguments of the People and counsel for Judge Cordova and the clerk, the court ruled. It found there was no barrier to the clerk giving testimony at the motion to strike the prior conviction and denied the motion to quash the subpoena as to the clerk. As to quashing the subpoena to Judge Cordova, the court rejected the public policy arguments of both sides and found Penal Code section 1321 makes section 703.5 applicable in criminal cases. The court found that under section 703.5 Judge Cordova is incompetent to testify unless one of the exceptions applied. None of the exceptions applied, and the trial court granted the motion to quash as to Judge Cordova.

In addition to Kott's case, a similar situation arose concerning real party in interest Benjamin Ruiz Lopez. Lopez was charged in two separate ongoing cases with alcohol related Vehicle Code violations. It was alleged in both cases that he suffered a prior conviction for driving with a blood alcohol level of .08 percent or above in October 2007 in Stanislaus County. (*People v. Lopez,* Stanislaus Super. Ct. Nos. 1241676 and 1242220.)

Lopez filed a motion to strike the prior conviction allegation in both cases, claiming the prior conviction was invalid because there was not an express, knowing, and voluntary waiver of his constitutional rights.

The minute order of the guilty plea proceedings in Lopez's case contained the same check marks and language as in Kott's case. Lopez was not represented by counsel when he entered his plea. The checklist was also prepared in Lopez's case with the same items checked as in Kott's case. In Lopez's case, the checklist was stamped with the initials "CP" and dated the same date as the minute order.

The People opposed the motion, claiming Lopez had not made a proper showing sufficient to require a hearing on the motion to strike. In addition, the People served a subpoena on Commissioner Ann Ameral, the commissioner who took Lopez's plea to the disputed prior conviction.

Commissioner Ameral filed a motion to quash the subpoena and was represented by the same counsel who represented Judge Cordova. The basis of the motion to quash was the same as in Kott's case.

On June 17, 2008, a hearing was held on the motions to quash in both of Lopez's present cases. This hearing was not heard by the same judge who heard Kott's motion to quash the subpoena. The court granted the motions to quash, finding that section 703.5 precluded the testimony of a judge or a commissioner in subsequent criminal proceedings.

The People filed petitions for writ of mandate in Kott's case and in Lopez's cases in the Appellate Division of the Stanislaus Superior Court, arguing the court erred in granting the motions to quash.

The Appellate Division denied the petitions for writ of mandate, finding that the motions to strike and set aside the prior convictions were not litigated, argued, or submitted for rulings and thus the rulings that were the subject of the petitions before the court were intermediate in nature and are not the proper subject of writs of mandate.

On August 27, 2009, the People filed a petition for writ of mandate and an application for a stay of the proceedings in Kott's and Lopez's cases. On August 28, 2009, we granted a stay as to all proceedings, including the hearings on the motions to strike the priors. In addition, we ordered real parties in interest to file a response to the petition. We subsequently ordered the respondent, the Superior Court of Stanislaus County, to file a response to the petition.

In December of 2009 we issued an order to show cause.

Discussion

At the outset we must determine if a writ of mandate should be issued to resolve the question regarding the quashing of the subpoenas to the judge and the commissioner. Petitioner makes numerous assertions in support of the argument that this court should determine the merits of the writ petition.

"In criminal as well as civil proceedings review of interlocutory rulings of trial courts by extraordinary writ generally is available only if there is no adequate remedy by appeal. (Code Civ. Proc., § § 1086, 1103 ….)" (*Serna v. Superior Court* (1985) 40 Cal.3d 239, 263.)

Quoting from *People v. Superior Court (Stanley)* (1979) 24 Cal.3d 622, petitioner claims writ review is proper where the trial court has committed an act "'in excess of jurisdiction and the need for such review outweighs the risk of harassment to the accused.'" Petitioner has parsed this quote leaving out language critical to our review. The sentence reads in its entirety: "*If the prosecution has not been granted by statute a right to appeal*, review of any alleged error may be sought by a petition for writ of mandate only when a trial court has acted in excess of its jurisdiction and the need for such review outweighs the risk of harassment of the accused." (*Id*. at pp. 625-626, italics added, fn. omitted.)

An appeal may be taken by the People from "[a]n order setting aside all or any portion of the indictment, information, or complaint." (Pen. Code, § 1238, subd. (a)(1).) If, after a proper hearing on the merits, the trial court grants one or more of the motions to set aside a prior conviction, the People would have the right to appeal.

Next, petitioner contends that rulings on motions to quash are the proper subject of review by writ of mandate. Although rulings on motions to quash subpoenas have been held to be the proper subject of review by writ of mandate filed by the People, this form of writ review is available only under limited circumstances. The cases relied on by petitioner do not support a finding that a writ of mandate is the appropriate remedy here.

In *Civiletti v. Municipal Court* (1981) 116 Cal.App.3d 105 the real party in interest, a defendant in a criminal case, issued a personal subpoena and a subpoena duces tecum to the then Attorney General of the United States. The Attorney General filed a motion to quash both subpoenas. The municipal court denied the motion to quash, and Attorney General Civiletti filed a petition for a writ of mandate in the superior court seeking to have the subpoenas quashed. The superior court ordered both subpoenas to be quashed and the real party in interest appealed. The real party in interest argued that mandate was not the appropriate remedy in the superior court because the Attorney General could have refused to comply and could have then appealed any order holding him in contempt. The appellate court disagreed and found that mandamus has been recognized as an appropriate remedy to compel the quashing of a subpoena duces tecum. (*Id*. at pp. 107-108.) The court went on to rule that the doctrine of sovereign immunity and the fact that the Attorney General was a highly placed public officer weighed against compelling such a witness to personally appear in answer to a subpoena.

The relief sought here is not the quashing of a subpoena. When a court erroneously denies a motion to quash, it allows evidence to be discovered that is not discoverable. This is similar to cases allowing writ review when the disclosure of evidence may undermine a privilege. "Despite the general rule disfavoring writ review of discovery matters, writ review is appropriate when petitioner seeks relief from an order which may undermine a privilege. [Citations.] As the court explains in *Roberts* [*Roberts v. Superior Court* (1973) 9 Cal.3d 330], interlocutory review by writ is the only adequate remedy in such cases, since once privileged matter has been disclosed there is no way to undo the harm which consists in the very disclosure." (*Raytheon Co. v. Superior Court* (1989) 208 Cal.App.3d 683, 686.) "Mandate is an appropriate remedy to prevent improper discovery." (*Davis v. Superior Court* (1992) 7 Cal.App.4th 1008, 1012.)

Petitioner relies on *People v. Superior Court (Broderick)* (1991) 231 Cal.App.3d 584 in arguing that writ review is appropriate here to review the quashing of a subpoena.

In *Broderick*, the trial court quashed subpoenas seeking records from mental health professionals who had treated a defendant facing retrial in a murder case. The trial court quashed the subpoenas on the grounds they violated the defendant's privilege against self-incrimination. The People sought a writ of mandate in the appellate court seeking disclosure of the material. The appellate court found that writ review should be accorded to the People. The appellate court began by citing to *Stanley* and stated that if review is not given the People may be deprived of discovery to which they are entitled. (*Id*. at pp. 586-589.)

The key is that under *Stanley* the prosecution must not have an available adequate appellate remedy. In *Broderick*, if the People did not receive the discovery they claimed they were entitled to receive, they would have had to proceed to trial without the materials, and if the defendant was found not guilty or guilty of a lesser offense they would not have any remedy for the claimed erroneous lack of discovery.

In *People v. Municipal Court (Bonner)* (1980) 104 Cal.App.3d 685 the People were afforded writ review. The defendant, real party in interest, was in an altercation with a police officer and sought numerous records relating to this officer. The People declined to comply with portions of a discovery order relating to records of a certain police officer. Real party in interest moved for sanctions based on the noncompliance with the discovery order, and the municipal court ordered that the testimony of the officer be suppressed at trial. The People filed a petition for writ of mandate in the superior court, and the superior court found the municipal court had not abused its discretion in making the discovery order and imposing sanctions. (*Id*. at pp. 688-689.)

The People appealed as authorized by statute. On appeal, real party in interest claimed that pretrial review of a discovery order by way of a writ of mandate was not available to the People in superior court. The appellate court disagreed because "the People had no adequate remedy by way of appeal from the order that these records be produced" and "[n]oncompliance with the discovery order would not automatically result

in dismissal of the criminal prosecution against real party." (*People v. Municipal Court (Bonner), supra,* 104 Cal.App.3d at p. 693.)

In *People v. Superior Court (Levy)* (1976) 18 Cal.3d 248 the Supreme Court denied the petition for a writ of mandate after the trial court ordered the prosecution to disclose the identity of a confidential informant. The Supreme Court found that the People had an adequate remedy by way of appeal. The People could refuse to comply with the disclosure order and suffer a dismissal as a consequence. The People could then appeal the dismissal order. (*Id*. at pp. 250-252.)

The situation here is most closely analogous to the *Levy* case. If, at the motion to set aside the prior conviction allegations, the trial court determines the prior convictions are not constitutionally valid, the court will set aside the convictions. The People will then have the right to appeal as provided in Penal Code section 1238, subdivision (a)(1).

Petitioner next argues that, even if writ review is not available in the normal course, a court may issue a writ of mandate when the issues presented are of great public importance and must be resolved promptly. The People claim they are being denied their right to present evidence, the issue is a recurring one, and the issue is one of great public importance.

A court may issue a writ of mandate when "'"the issues presented are of great public importance and must be resolved promptly."'" (*Anderson v. Superior Court* (1989) 213 Cal.App.3d 1321, 1328.)

Petitioner claims this issues concerns a matter of grave public importance as it involves an inadequate minute order that has been used by Stanislaus County for over two years and has the potential to wipe out thousands of prior convictions. Yet, in the reply to the answer filed by Lopez in this court, petitioner "vehemently disputes" that Lopez and Kott "have met their burden of proof of establishing that the records of the prior convictions are facially invalid."

We believe the course of these proceedings went astray when, in response to the motions to strike the prior convictions, the People conceded the record did not contain the words "expressly" or "explicitly" when describing the waiver of constitutional rights by the real parties in interest and thus the court could not "infer from this record that [the defendants] *expressly* and *explicitly* waived [their] constitutional rights" as required by case law. In fact, case law establishes that the record need not "*specifically* state that the waivers were express and explicit." (*People v. Anderson, supra,* 1 Cal.App.4th at p. 324.) Thus, the premise underlying petitioner's initial concession was erroneous.

It has not yet been determined whether in fact the minute orders here are invalid on their face. Additionally, if it is determined by the trial court at the motion to set aside the prior convictions that the minute orders are invalid on their face, the orders of the court quashing the subpoenas to the judge and the commissioner do not preclude the petitioner from calling all nonjudicial witnesses in order to prove the validity of the prior convictions. Thus, the order quashing the subpoenas is not tantamount to setting aside the prior convictions, and petitioner has not shown that it would be a futile gesture to move forward with the motion to set aside the prior convictions.

"'A remedy will not be deemed inadequate merely because additional time and effort would be consumed by its being pursued through the ordinary course of the law. [Citation.]' [Citation.] Inconvenience does not equal irreparable injury." (*Unnamed Physician v. Board of Trustees* (2001) 93 Cal.App.4th 607, 620.)

Under the circumstances here, we believe a writ of mandate should not issue because petitioner has an adequate remedy at law. Petitioner can proceed to a hearing on the merits of the motions by real parties in interest to set aside their prior convictions. It is quite possible that the orders after hearing will be favorable to petitioner. If they are not favorable and the prior convictions are set aside, then petitioner can seek appellate review. At this point in time, petitioner has failed to show irreparable injury or that there is no adequate remedy available other than issuing a writ of mandate.

The matter is not one of grave importance because a pattern of setting aside prior convictions has not occurred based on the quashing of a summons to a judge or commissioner. In fact, petitioner has not shown that any prior convictions have been set aside based on the records in question. Petitioner has an adequate remedy, and it would be premature for us to decide the matter at this time when the cases have not proceeded to the motion to set aside the prior convictions.

Disposition

The petition is denied. The alternative writ is discharged as improvidently granted and this court's stay order is dissolved. Because our discharge of the writ is not a ruling on the merits of petitioner's contentions with respect to the question of whether the trial court properly quashed the subpoenas, this decision does not have preclusive effect. (*Countrywide Home Loans, Inc. v. Superior Court* (1997) 54 Cal.App.4th 828, 833.)

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VARTABEDIAN, J.

WE CONCUR:

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ARDAIZ, P. J.

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LEVY, J.